[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-14743
Non-Argument Calendar

D.C. Docket No. 1:18-cv-00594-ACA

ALVIN WALKER,

Plaintiff-Appellant,

versus

ERGON TRUCKING, INC.,
RICHARD MCGINNIS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(August 18, 2021)

Before MARTIN, JORDAN, and GRANT, Circuit Judges.

PER CURIAM:

Alvin Walker appeals the district court's decision to exclude his expert's opinion as well as its grant of summary judgment to Richard McGinnis and Ergon Trucking, Inc. After careful consideration, we affirm both rulings.

I. BACKGROUND

This case arises out of a motor vehicle accident between Walker's car and a commercial tractor-trailer truck driven by McGinnis. The accident occurred on the evening of February 13, 2017, at the intersection of U.S. Highway 280 and Coosa Street in Sylacauga, Alabama. Right before the accident, McGinnis was driving in the right-hand lane on Highway 280 towards Coosa Street. He was driving right around 59 miles per hour, just over the posted speed limit of 55 miles per hour. McGinnis had a green traffic light as well as the right of way at the intersection. The parties dispute whether McGinnis looked around and saw any potential hazard as he approached the intersection.

As McGinnis drove through the intersection, Walker turned right off of Coosa Street to merge onto Highway 280. Highway 280 has a designated lane for merging onto the highway from Coosa Street. However, instead of using the designated lane, Walker immediately entered McGinnis's lane, and the two vehicles collided less than a second later. Walker did not use his turn signal or otherwise indicate he might enter McGinnis's lane. Walker looked "straight ahead" and did not look for approaching traffic on Highway 280, even though he knew he was required to yield to the right of way. McGinnis's dash cam recorded the accident.

In March 2018, Walker and his wife Bobbie Jo[1] sued McGinnis and his employer, Ergon Trucking (collectively "Defendants"), in Alabama state court. Defendants removed the case to federal court based on diversity jurisdiction. In the operative complaint, Walker brought claims of negligence, subsequent negligence, and wantonness against McGinnis and sought to hold Ergon Trucking vicariously liable for McGinnis's conduct. Walker alleged McGinnis failed to keep a proper lookout, maintained an unreasonable and imprudent speed, failed to warn Walker with his horn, did not keep his truck under control, and failed to brake or change lanes. Walker also alleged McGinnis's conduct caused various injuries and sought damages for medical expenses and emotional distress, among other things.

During discovery, Walker disclosed safety consultant Whitney Morgan as an expert witness. Defendants ultimately moved to exclude Morgan's opinion under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993). The district court granted Defendants' motion, finding Morgan's opinion inadmissible under Daubert for three reasons. First, the court found Morgan was not "qualified to offer an opinion on the proper operation of a tractor-trailer," the issue on which he was to testify. Second, the court found that the methodology

[1] Bobbie Jo did not appeal the district court's decisions, so we address only Walker's claims here.

Morgan used to reach his opinion, which included relying on a commercial driver's license manual, was not reliable because there was no indication other experts in the field would also use that methodology. Finally, the court found Morgan's opinion did "not offer any insights beyond the understanding of the average lay person and would not be helpful to the factfinder." Separately, the court stated, even assuming Morgan's opinion was admissible under Daubert, it was inadmissible under Federal Rule of Evidence 403 because the opinion's risk of confusion or misleading the jury substantially outweighed its probative value. Specifically, the court noted Alabama law says a driver may presume others will obey traffic laws and, contrary to that rule, Morgan's opinion created the impression that McGinnis had an affirmative duty to anticipate Walker's failure to use the designated lane for merging.

In addition to their challenge to Walker's expert, Defendants also moved for summary judgment on all claims. The district court granted that motion as well. For Walker's negligence claim, the district court found McGinnis did not breach any duty. Alternatively, the court found that even if McGinnis had breached a duty, Walker's own negligence contributed to his injuries, which is a complete defense to negligence under Alabama law. And while noting that subsequent negligence by a defendant allows a negligent plaintiff to avoid a contributory negligence defense, the court found that rule did not apply here because the

accident occurred "within the same second" that it became apparent Walker was entering McGinnis's lane. Finally, the court found Walker's wantonness claim failed because there was no evidence McGinnis acted with the requisite consciousness.

Walker thereafter appealed the district court's decisions excluding Morgan's expert opinion and granting summary judgment to Defendants.

II. STANDARDS OF REVIEW

We review evidentiary rulings, including Daubert rulings, for abuse of discretion. United States v. Pon, 963 F.3d 1207, 1219 (11th Cir. 2020). We review de novo a district court's decision granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. Belcher Pharms., LLC v. Hospira, Inc., 1 F.4th 1374, 1379 (11th Cir. 2021). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III. DISCUSSION

We start with the district court's decision to exclude Morgan's expert opinion. We then turn to the district court's decision to grant summary judgment in favor of Defendants.

A. Evidentiary Ruling

Walker argues the district court abused its discretion in excluding Morgan's expert opinion under Daubert. According to Walker, Daubert does not apply to non-scientific experts like Morgan. He also argues Morgan was qualified, relied on various pieces of information for his opinion, and provided an opinion helpful to the trier of fact.

As an initial matter, we need not decide whether the district court abused its discretion in excluding Morgan's expert opinion under Daubert because Walker does not challenge the district court's other independent ground for excluding the opinion. Namely, after addressing Daubert, the district court found, even if Morgan's opinion was admissible under Daubert, it would still be properly excluded under Rule 403. Walker's failure to challenge this independent ground on appeal means he has "abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 680 (11th Cir. 2014).

But even if we were to reach the question of whether the district court abused its discretion in excluding Morgan's expert opinion under Daubert, we would affirm on that basis as well. Contrary to Walker's assertion, it is well established that Daubert applies to non-scientific experts. Kumho Tire Co. v.

Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 1171 (1999). And under Daubert, this Court applies a "rigorous three-part inquiry" that considers whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Hendrix ex rel. G.P. v. Evenflo Co., 609 F.3d 1183, 1194 (11th Cir. 2010) (quotation marks omitted). The party putting forward the expert testimony "bears the burden of showing, by a preponderance of the evidence, that the testimony satisfies each prong." Id.

Walker has not carried his burden. Assuming Morgan was qualified and his opinion was helpful to the trier of fact, Walker has not shown Morgan's methodology was reliable in this case. When considering the reliability of an expert's methodology, we look to several factors, including: "(1) whether the methodology can be and has been tested, (2) whether the theory or technique has been subjected to peer review, (3) the known or potential rate of error of the methodology employed, and (4) whether the methodology is generally accepted." Hughes v. Kia Motors Corp., 766 F.3d 1317, 1329 (11th Cir. 2014).

In his expert report, Morgan repeatedly quoted various instructions from the commercial driver's license manual and then discussed whether McGinnis

followed each instruction based on deposition testimony from McGinnis and Ergon Trucking's director of safety and compliance. Based on this analysis, Morgan opined that "McGinnis'[s] actions and/or inactions, as well as his lack of knowledge and skill in the safe operation of [commercial motor vehicles], demonstrated a conscious disregard for the safety of other motorists." Morgan never addressed, and Walker does not discuss on appeal, whether Morgan's methodology was tested, whether it was subject to peer review, whether it was generally accepted, or how it was otherwise reliable. See id. (listing the relevant factors for considering the reliability of a methodology). On this record, Walker has not shown Morgan's methodology was reliable under Daubert, and thus the district court did not abuse its discretion in excluding the expert opinion.

B. Summary Judgment Ruling

Walker next argues the district court erred in granting summary judgment in favor of McGinnis on his claims of negligence, subsequent negligence, and wantonness.[2] We address each claim in turn.

1. Negligence Claim

Under Alabama law, a negligence claim "requires the establishment of a duty and a breach thereof that proximately caused damage to the plaintiff." S.

[2] Walker does not raise his vicarious liability claims against Ergon Trucking in his appeal. This means he has abandoned these claims and we cannot consider them. See Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004).

Coast Props., Inc. v. Schuster, 583 So. 2d 215, 217 (Ala. 1991). Relevant here, a driver has a duty to "keep a reasonable lookout for danger or obstructions while driving along the public road." Holley v. Josey, 82 So. 2d 328, 332 (Ala. 1955). Even so, a driver "approaching an intersection may presume that others will obey the traffic laws," and there is no duty to "keep a special lookout for other vehicles when a driver is observing the rules relating to traffic signals." Pearson v. Fountain, 189 So. 2d 551, 553 (Ala. 1966). Beyond that, in certain circumstances a violation of a statute or an ordinance can amount to negligence per se. See Parker Bldg. Servs. Co. v. Lightsey ex rel. Lightsey, 925 So. 2d 927, 930–31 (Ala. 2005).

Even if the plaintiff establishes a negligence claim, the defendant has a "complete defense" to that claim if he can show the plaintiff was contributorily negligent. Serio v. Merrell, Inc., 941 So. 2d 960, 964 (Ala. 2006). A contributory negligence defense requires the defendant to show the plaintiff: (1) knew of the dangerous condition, (2) appreciated the danger under the surrounding circumstances, and (3) failed to exercise reasonable care by placing himself in the way of danger. Id. However, "[d]irect evidence of such an appreciation of danger is not required if the evidence admits of no conclusion except that the plaintiff must have appreciated the hazard involved." Id. at 965. In such a situation, it is "enough if the plaintiff understood, or should have understood, the danger posed."

Id. In Serio, the Alabama Supreme Court affirmed summary judgment for the defendant because the plaintiff was contributorily negligent by merging onto a public highway in the path of an oncoming truck with the right of way that she would have seen had she looked for oncoming traffic before or as she merged. Id. at 965–66. The Alabama Supreme Court deemed it "self-evident" that the plaintiff should have "consciously appreciated that danger." Id. at 965.

Walker argues McGinnis was negligent by speeding in violation of the posted speed limit and by failing to maintain a proper lookout, slow down, warn of his presence, and change lanes. But even assuming McGinnis was negligent, the record shows Walker was contributorily negligent because he merged right into McGinnis's truck. Several undisputed facts bear this out. While merging onto Highway 280, Walker immediately entered McGinnis's lane, even though there was a designated lane for safely merging onto the highway. Walker did not use his turn signal or otherwise indicate he might enter McGinnis's lane. Walker looked "straight ahead" and did not look for approaching traffic, even though he knew he was required to yield to the right of way. As in Serio, it is "self-evident" Walker consciously appreciated the danger of his conduct and failed to exercise reasonable care by placing himself in the way of danger. See Serio, 941 So. 2d at 965–66. And because Walker was contributorily negligent, McGinnis had a "complete

defense" to Walker's negligence claim. See id. at 964. The district court therefore correctly found McGinnis was entitled to summary judgment on this claim.

2. Subsequent-Negligence Claim

To show subsequent negligence, the plaintiff must demonstrate: (1) the plaintiff was in a perilous position, (2) the defendant had knowledge of the plaintiff's peril, (3) the defendant, armed with such knowledge, failed to use reasonable and ordinary care in avoiding the accident, (4) the use of reasonable and ordinary care would have avoided the accident, and (5) the plaintiff was injured as a result. Zaharavich v. Clingerman ex rel. Clingerman, 529 So. 2d 978, 979 (Ala. 1988). Contributory negligence is not a defense to a claim of subsequent negligence. Id. However, a claim of subsequent negligence is unavailable where the plaintiff's peril and the accident are "virtually instantaneous." Baker v. Grantham, 585 So. 2d 896, 897 (Ala. 1991).

Walker argues McGinnis was subsequently negligent because he "fail[ed] to take appropriate steps to recognize the peril and avoid the collision." However, Walker's peril and the accident were "virtually instantaneous," so a claim of subsequent negligence is not available to Walker. See id. Specifically, Walker was not in peril until he entered McGinnis's lane, and it is undisputed the two vehicles collided less than a second later. McGinnis thus could not have been

subsequently negligent during that brief instant of time. The district court therefore correctly granted summary judgment to McGinnis on this claim.

3. Wantonness Claim

Wantonness is "the conscious doing of some act or the omission of some duty while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result." Ex parte Essary, 992 So. 2d 5, 9 (Ala. 2007). While speeding alone does not amount to wantonness, speeding together with other circumstances may. Hicks v. Dunn, 819 So. 2d 22, 24 (Ala. 2001). Under Alabama law, there is a rebuttable presumption that, unless his judgment is impaired, a driver does not act wantonly in causing a car accident. See Thomas v. Heard, 256 So. 3d 644, 657–58 (Ala. 2017) (per curiam). That is because humans "act in their own self-interest," and thus the driver has "no consciousness that an injury would likely occur from his actions because presumably he would not engage in activity that would knowingly result in harm to himself." Id. at 658.[3]

Walker argues McGinnis acted wantonly by speeding and by failing to see Walker, slow down, stop the truck, and warn of his presence. The record does show McGinnis was (barely) speeding, but even assuming he was consciously

[3] Unlike a negligence claim, "[c]ontributory negligence is not a defense to a claim based on wantonness." Gulf States Steel, Inc. v. Whisenant, 703 So. 2d 899, 907 (Ala. 1997).

speeding (which is not clear), speeding alone is not enough to show wantonness. Hicks, 819 So. 2d at 24. And while Walker argues McGinnis also failed to see him and react accordingly, there is no record evidence McGinnis did so consciously, let alone McGinnis was conscious that injury would likely result from those omissions. See Essary, 992 So. 2d at 9. As such, Walker has not shown McGinnis acted wantonly leading up to the accident. The district court therefore correctly found McGinnis was entitled to summary judgment on Walker's wantonness claim.

IV. CONCLUSION

The district court did not abuse its discretion in excluding Morgan's expert opinion and correctly granted summary judgment in favor of McGinnis on all of Walker's claims.

AFFIRMED.